IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1357.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; AND LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD AND ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 433 F. 2d 302 (Pet. App. 1-2). The decision of the National Labor Relations Board is reported at 179 NLRB No. 33 (Pet. App. 6-30).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether the Board and the Court of Appeals abused their discretion in deciding that the unions' picketing and threats of picketing violated the "secondary boycott" provision of the National Labor Relations Act (Section 8(b)(4)(i) and (ii)(B)). That statute is quoted on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE.

This case involves picketing and threats of picketing at an apartment building still under construction. In accordance with custom, Bell was asked by the developer (Winston) to install telephone cables in advance so that service could be ready for the new occupants as soon as they moved in (Tr. 61, 71-72, 76-77, 93-95, 118-26, 129-31). Only a part of that work had been completed when the unions began a strike against Bell in May, 1968 (Tr. 131).

By August 25 over 100 families were in the building, all of them without any telephone service (Tr. 53-55, 133-34). The building is 17 stories high with 16 apartments on each floor, and 600 feet from the public street (Charging Party's Ex. 1, Tr. 49). The need for telephone service was extreme, not merely as a matter of convenience, but also for basic protection against fire, crime, and sickness (Tr. 52, 68, 75, 106). Bell had "many" orders pending (Tr. 106), and there were numerous complaints from occupants about the lack of telephone service (Tr. 75-76).

On Saturday, August 24, and Sunday, August 25, Bell management employees worked all day placing telephone cable within the building (Tr. 82-86, 104). They returned about 5:30 p.m. on Monday, August 26, and worked until 1:30 a.m. Tuesday (Tr. 86-88). Following their instructions, the crew arrived at 5:30 p.m., "so we wouldn't be there when the trades are there. . . ." (Tr. 100). That evening they installed telephones for two doctors, three cardiac patients and a pharmacist (Tr. 27, 33-34, 88-91). The evidence is clear that when they left early Tuesday morning there was no further work scheduled for them at

that location; on the contrary, they were scheduled to work elsewhere (Tr. 60, 64, 91-92, 102, 108-09).

The union pickets first appeared seven hours later, at about 8:30 a.m. on Tuesday, August 27 (General Counsel's Ex. 3; Tr. 16-18). No other Bell employees were present during *any* of the picketing (Tr. 23, 40, 60, 64, 66, 69-70, 91-92, 109-10, 113). Suppliers to the building and its occupants were stopped by the pickets on Tuesday, and 12 or more turned away (Tr. 18-23).

The unions' strike director flatly told the builder that "his main complaint" was the work previously done on Saturday and Sunday* (Tr. 26-28). He threatened at least three times (Tr. 25-32) that:

> "the pickets would continue . . . until the permanent installation that the Bell people had installed on the previous Saturday and Sunday was disconnected and removed from the job." (Tr. 30; Petitioners' Brief, p. 6.)

Shortly after the picketing began, the project manager "made certain no work would be done" by Bell (Tr. 64, 69-70). The picketing continued until on or about Monday, September 9, with very serious effects on deliveries of all kinds as well as on the construction work itself (Petitioners' Brief, p. 6; Tr. 18-23, 36-48). Only the approaching District Court hearing on the Board's petition for a temporary injunction under Section 10(l) of the Act had any significant effect (Tr. 139-40).

All of the evidence was uncontradicted. The Trial Examiner recommended an order in the language of the statute, and a Board panel approved unanimously (Pet. App. 6-30). The Court of Appeals affirmed unanimously (Pet. App. 1-2).

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* Petitioners' brief likewise says this was "the reason for the pickets" (pp. 6, 12).

ARGUMENT.

I. THE DECISIONS BELOW ARE CLEARLY CORRECT.

The two basic purposes of primary picketing are (1) to induce the primary employees to withhold their labor, and (2) to inform the public that a strike exists, so that customers, vendors and deliverymen may freely decide *without coercion* whether they wish to deal *with the primary employer.* Neither one of those objects was present here. The unions' "main complaint" was the fact that permanent telephone cable had been installed before the picketing ever began (Tr. 26-32). They continued picketing the neutral location for about two weeks even in the absence of any Bell personnel (Tr. 23, 40, 64, 66, 69-70, 91-92, 109-10, 113). The sole purpose of that picketing was to stop all work on the building and all deliveries of any kind to all of the occupants of the project, in order to (a) coerce Winston into removing Bell cable which was already serving emergency cases in its building, (b) deny additional telephone and other services to all the occupants, and (c) demonstrate to everyone in the construction field in Chicago the serious hazards of doing any business with Bell at any time during the strike. This is precisely the kind of pressure on neutrals which Congress intended to prevent by Section 8(b)(4) of the Act.

The general contractor for the uncompleted apartment building had approximately the same relationship to the telephone company's output that he did to that of the subcontractors working on other parts of the same project. The Board was therefore correct in finding that this case falls squarely within the long-established rule of *NLRB* v. *Denver Building Trades Council,* 341 U. S. 675 (1951);

Local 501, IBEW v. *NLRB,* 341 U. S. 694 (1951); and *Local 74, Carpenters* v. *NLRB,* 341 U. S. 707 (1951). There are some contractual differences between those three cases and the case at bar which could affect the possible profits of the primary and secondary employers, but they make this case an even stronger one for Board action, as shown on page 11 of this brief.

II. PETITIONERS HAVE ALREADY CONCEDED VIOLATIONS WHICH FULLY SUSTAIN THE DECISIONS BELOW.

The Board expressly found that the threats made by the union strike director to the builder were a violation of the Act independently of any picketing (Pet. App. 19). Petitioners never objected to that finding, even after we repeatedly called attention to their silence, which now forecloses any argument under the third sentence of Section 10(e) of the Act.

The Board also found that one of the unlawful objects of the picketing was "to disrupt Winston's business relations with its subcontractors." (Pet. App. 22.) Petitioners did not except to this finding either, and it is now too late to do so.

III. THERE IS NO CONFLICT OF DECISION.

In the court below the petitioners claimed without success (both in the oral argument and in a subsequent letter of their counsel to that court) that the decision of the Third Circuit in *NLRB* v. *Local 825, Operating Engineers,* 410 F. 2d 5 (1969), was "valid precedent" for setting aside the Board's order in this case. This Court's decision this January reversing the Third Circuit disposes of all such arguments. 27 L. Ed. 2d 398 (1971). Indeed, petitioners' conduct in this case clearly falls within the condemnation of

both of the opinions in the *Local 825* case, and involves only well-settled law. Their original aim was to close down all construction and all telephone service "for the duration" (27 L. Ed. 2d at 407) at the picketing site, notwithstanding the absence of Bell employees. *NLRB* v. *Denver Building Trades Council,* 341 U. S. 675 (1951); *Local 501, IBEW* v. *NLRB,* 341 U. S. 694 (1951); and *Local 74, Carpenters* v. *NLRB,* 341 U. S. 707 (1951), already cited, are also applicable. The minor differences between the unions and the Court of Appeals as to the precise facts of this case likewise fall within the rule of *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 491 (1951). There is no serious claim in the unions' brief of any conflict between circuits.

We shall answer the unions' reasons in the order in which they appear in their brief. None of them justifies the granting of the writ.

A. The Mere Presence of a Minor Amount of Telephone "Facilities" at the Site Did Not Authorize Either the Picketing or the Unions' Threats.

Of course, the unions were not attempting to convince or persuade the copper cable or the few telephones in the apartment house of anything; nobody wastes his time picketing property as such.* They were not attempting to persuade the absent Bell management workers to join their strike. They were not attempting to persuade the doctors and cardiac cases in the apartments to give up their telephones. To borrow the language of page 12 of the unions' brief, their picketing and threats were "essentially directed toward the secondary employers . . .," none of whom was working for Bell. The pickets forced those neutrals to

* It seems probable that in each of the four building cases already cited some property owned by the primary employer was present at the job site at the time the unfair labor practice was committed. However, the opinions do not discuss the matter.

exclude Bell from the building site thereafter, except to the limited extent that the unions later gave their grudging "permission" for emergencies (Petitioners' Brief, p. 7; Tr. 49-53, 66, 91-92).*

In their briefs below the unions insisted that the evidence showed that they had complied with all four of the tests for primary picketing at a common situs location established by the Board in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950).** Nevertheless, the Board held that the evidence showed that the unions had not complied with the first two of the four tests, and the Court of Appeals affirmed.

But in their brief here the unions take a different tack. They no longer affirmatively claim compliance with *Moore Dry Dock*, but say instead (p. 10):

> "These findings were based upon an *alleged absence of evidence* from the Petitioners after the trial examiner improperly shifted the burden of proof from the General Council [sic] to the Petitioners."***

This is a clear misstatement of what the Board did. What the Board actually found was:

> "The undisputed evidence establishes that no Bell employees were on the jobsite and that Bell was not engaged in its normal business there during the picketing (August 27 to September 6)." Pet. App. 18.

The Board's opinion goes on to support those findings with

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* Petitioners' brief says that they "cooperated with allegedly sick apartment owners by not objecting" on "cardiac or other emergency problems" (p. 7). And yet on page 20 of the same brief the unions assert that the doing of the emergency work which they approved justified their previous picketing.

** But at the same time, petitioners told the court below that "*there was no evidence* in the record at to when strikebreakers were actually doing the struck work." (P. 24 of their brief in the Court of Appeals; all italics in this brief are ours.)

*** Similar statements appear on pages 19 and 21.

several specific facts. The General Counsel produced Speer, the project manager, at the hearing, and he testified flatly that no Bell work was done after picketing started except with union permission (Tr. 10-78). In addition, Bell produced men who actually placed the cable and installed the telephones, and they testified about it fully (Tr. 78-114, 118-37). These witnesses were cross-examined without success. The unions had pickets at the only entrance to the project (Tr. 14-17), and fellow unionists were assigned to work in the building and actually worked on August 27 (Tr. 34-37). They could easily have been called by the unions if their proof would have helped. The unions' lawyer twice stated that he was "particularly interested in the main cable installation" (Tr. 142-43), and the record clearly shows that that work was finished before picketing ever began (Tr. 87-88, 108).

Local 761, Electrical Workers v. *NLRB*, 366 U. S. 667 (1961); *Steelworkers* v. *NLRB*, 376 U. S. 492 (1964); and *B. R. T.* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969),* cited by petitioners (and by this Court in the *Local 825* case; 27 L. Ed. 2d at 404-07), all involved picket lines near a major employment center of the primary employer, directed against other employers doing certain types of routine work (but not building construction—compare 366 U. S. at 680-81) *for the primary employer*. They did not hold that it was lawful under the Labor-Management Relations Act to picket anywhere that General Electric or Carrier products were present or in use. Enlarging them to include the case at bar would mean that Section 8(b)(4) could never apply to any utility strike, because virtually

* Justices Douglas, Black and Stewart concluded that the Jacksonville picketing was part of a secondary boycott (394 U. S. at 394); the majority declined to decide whether it was or not. 394 U. S. at 393. But the case involved the jurisdiction of the Florida courts and not the "precise extent" of the Labor-Management Relations Act. 394 U. S. at 391.

every building contains some utility-owned facilities. The Courts of Appeals have repeatedly held that the mere presence of property owned by the primary employer does not take the picketing out of the Act. *NLRB* v. *Carpenters District Council*, 383 F. 2d 89, 92 (8th Cir. 1967) (loaded trailer); *National Maritime Union* v. *NLRB*, 367 F. 2d 171 (8th Cir. 1966), *cert. den.*, 386 U. S. 959 (1967) (barge at neutral dock); *Columbus Building Trades Council (Merchandise Prop., Inc.)*, 149 NLRB 82, 91 (1964), *enf.*, 359 F. 2d 385 (6th Cir. 1966) (construction materials); *Local 861, IBEW (Plauche Elec. Inc.)*, 142 NLRB 1106, 1109 (1963), *enf.*, 353 F. 2d 736 (5th Cir. 1965) (reels of wire and a conduit); *NLRB* v. *Local 691, Teamsters*, 270 F. 2d 696 (7th Cir. 1959) (trailers); *NLRB* v. *Local 135, Teamsters*, 212 F. 2d 216 (7th Cir. 1954) (tractors).

B. This Case Involves "Doing Business" as That Term Is Used in the Act.

Both Illinois and the United States regulate the telephone business in the public interest by restricting earnings, requiring good service without discrimination, and, among many other things, limiting the right of entry of new firms into the field. Ill. Rev. Stat., 1969, c. 111⅔; 47 USC § 151 et seq. Hence the unions label the telephone company a "monopoly," and suggest that this Court hold that telephone customers and those erecting buildings for them are excluded from any of the protection of Section 8(b)(4) of the Act. The Board properly rejected that contention (Pet. App. 20-22).

The unions do not cite one word in the statute or the cases which could support such a distinction, and there are at least seven utility cases similar to this one in which the subsection has been applied, four involving locals of this same international. *NLRB* v. *Local 3, IBEW*, 325 F. 2d

561 (2d Cir. 1963) (involving New York Tel. Co.); *NLRB* v. *Local 12, Plumbers,* 320 F. 2d 250 (1st Cir. 1963) (Boston Gas Co.); *Local 638, Plumbers (Consolidated Edison Co.),* 183 NLRB No. 61 (1970); *Local 3, Telephone Workers (Campanella Corp.),* 175 NLRB No. 118 (1969); *Local 134, IBEW (Polly Electric),* 175 NLRB No. 88 (1969) (Illinois Bell was one of the neutrals); *Local 41, IBEW (New York Tel. Co.),* 162 NLRB 620 (1967); *Local 11, IBEW (General Tel. Co.),* 151 NLRB 1490 (1965).

But the strongest reason against such a novel exception is that the neutrals in the case at bar need the Act's protection even *more* than if they had been able to secure telephone service freely from other sources. What the unions have callously ignored ever since the morning of August 27, 1968, is the serious effect of *their* monopolistic misconduct (almost wholly unregulated) on the thousands of neutrals caught in the middle of a telephone strike and unable to get service. This is the group which Congress particularly intended to protect, and the one which would suffer the most from the union proposal. The Board's order in this case would still be necessary even if Congress had said that it had no intention of protecting Bell from anything.

The unions concede that there was a "disruption in telephone service" (brief, p. 14), but assert that it was for only "a few days to less than two weeks" and "so slight." No record references are given to support those excuses and none exist. On the contrary, the unions' interference was prolonged and substantial. Their original demand for the removal of the cable would have stopped all telephone service to the entire apartment building for the duration of the strike. It is conceded that picketing in support of that demand began on August 27 and continued until approximately September 9 (Petitioners' Brief, p. 6). If it had not been for the September 10 court hearing on the Board's petition for a temporary injunction under Section

10(l) of the Act, it is obvious that the picketing would have continued until September 23 (Tr. 139-40).

About the time that the picketing stopped the unions agreed to permit a few phones to be connected for "people . . . desperately in need" who would beg the unions' permission (Tr. 51-53). That procedure was followed "100 percent" for the rest of the strike, even though no pickets were present (Tr. 53, 66, 92, 127-29). Thus the unions continued to interfere with the free installation of telephones even after their picketing had been suspended, and were keeping alive their threat that they might resume picketing if their restrictions were not fully observed. Those families who did not obtain union permission did not get any service until sometime after the end of the strike (Tr. 127, 136). Certainly no one on the 17th floor of a large Chicago apartment house who had been complaining about the lack of a telephone before August 25 would consider an additional month's delay to have been a "slight" "disruption," particularly if he were a heart patient or a doctor (Tr. 75-76, 106, 127, 136).

In building construction even a few hours' delay may be extremely costly to some or all of the neutrals, especially when coupled with a threat of a continuance into the indefinite future. The Act has never been construed to excuse picketing otherwise unlawful merely because it lasted only "a few days." In *NLRB* v. *Local 825, Operating Engineers*, 27 L. Ed. 2d 398, 403 (1971), the two stoppages which violated Section 8(b)(4)(B) lasted for five hours and for four days, respectively. In *Local 501, IBEW* v. *NLRB*, 341 U. S. 694, 705-06 (1951), the picketing lasted for only a few minutes on April 16 and interference was threatened on April 17. 82 NLRB 1028 at 1040-41 (1949). In *NLRB* v. *Carpenters District Council*, 383 F. 2d 89, 92 (8th Cir. 1967), the "stoppage lasted about 45 minutes" and the picketing was approximately the same length of time.

C. The Neutrals Were Not Allies of Bell.

The unions contend that because Winston wanted to obtain telephone service for the apartment house, and did what it could to achieve that result, it became an "ally" of the primary employer within the dictum in *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U. S. 612 (1967) (5-4 decision) (noted in the *Local 825* case on a different point; 27 L. Ed. 2d at 404). The Board rejected that defense on page 11 of its decision (Pet. App. 22-24), and no claim is even attempted that Winston's subcontractors, or the occupants of the apartments, or any of their deliverymen were allies of anyone.

The unions would define the term "ally" so broadly that it would include practically every case of a secondary boycott, and make Section 8(b)(4) of the Act a dead letter. There is no claim that Winston or any of the other neutral firms working on the site or attempting to make deliveries to it ever offered to do any of Bell's work, or ever threatened or attempted to do it, or were even capable of doing it. On the contrary, as soon as threats and picketing began Winston offered to exclude all telephone employees during the rest of the strike, and did so, except as the unions agreed. The written guarantee and the cash payment offered by the builder (Tr. 30, 32) clearly show that it was not an ally of Bell. These would have produced everything which any legal picket line could possibly have been trying to accomplish, all at no further cost to the unions. Nevertheless, the unions did not accept or request the guarantee or the payment, either then or later. Obviously, the presence or absence of Bell workers at the project was not the unions' real concern at any time. Board Decision, p. 12 (Pet. App. 25).

Bell and Winston dealt at arm's length, and neither controls the other or shares in the other's profits. Of course,

Winston desired to have its apartment building finished as quickly and efficiently as possible, and cooperated for a time with Bell to achieve that end. Every victim of an unlawful boycott needs the goods or services which are being denied to it, and the greater his need the more obvious it is that Congress sought to protect him. But Winston's need here is no different from that of any other victim of a secondary boycott. If the "ally" doctrine were applied here to excuse the picketing and threats, it would apply in every other violation of Section 8(b)(4). The *National Woodwork* case is not in point; it involved a primary boycott to preserve on-the-job work for carpenters. There was no picketing and the Board dismissed the charges.

D. There Was No Denial of Due Process.

At the Board hearing the unions rested without demanding any more evidence or presenting any proof of their own which would cast the slightest doubt on the case against them. As the Board correctly found, they were really "indifferent and unconcerned about Bell's work schedule." Board Decision, p. 12 (Pet. App. 25). Their major contention before the Board was that the "cease doing business" object was not present. Board Decision, p. 4 (Pet. App. 19-20). Their complaint about company records received only passing mention in their briefs and exceptions.

But in the Court of Appeals this became their main defense. It was analyzed and rejected. It is simply untrue to say that the company *refused* to produce such records.* Bell produced everything relevant which it could find (Tr.

* That statement appears on pages 3 and 10 of petitioners' brief. We regret that the records were destroyed in a routine manner before this contention was ever raised. If we had guessed that such a claim would be attempted, we would have saved them.

90-91, 141-45). We have already discussed the quantity of eyewitness evidence on this point on page 9 of this brief. The impartial witness in the best position to know all of the facts was the project manager. His testimony was perfectly clear and was credited by the Trial Examiner (Pet. App. 13-14).

The unions are the only ones in possession of relevant evidence which has not been presented. Their pickets and their members working on the building knew exactly what telephone work was done during the strike and when. But they never appeared to testify because their evidence would have been completely inconsistent with all of their defenses.

CONCLUSION.

The unfair practices began in August, 1968, and the complaint was issued on September 12. The unions delayed the Board hearing and also the argument before the Seventh Circuit. When that decision came down almost at once they next moved for a pointless rehearing, and finally took the full 92 days before petitioning for certiorari. The purposes of the Act are defeated by such delays, and we respectfully urge that petitioners be promptly required to comply with the law by a denial of their petition.

Respectfully submitted,

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